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Attorneys for Defendant Sierra Media, Inc.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

FLIR Systems, Inc., an Oregon corporation,

CASE NO. CV10-971 HU

Plaintiff,

**DEFENDANT SIERRA MEDIA, INC.’S
MOTION TO DISMISS FOR FAILURE
TO STATE A CLAIM**

v.

Fluke Corporation and Sierra Media, Inc.,

(ORAL ARGUMENT REQUESTED)

Defendants.

LOCAL RULE 7.1 CERTIFICATION

Counsel for Sierra Media, Inc. (“Sierra Media”) conferred in good faith with counsel for FLIR Systems, Inc. (“FLIR”) prior to the filing of this Motion. Counsel for Sierra Media conferred with counsel for FLIR by telephone on November 29, 2010, regarding the grounds for the present motion. The parties were unable to agree to a resolution that would have obviated the need for the present motion. Later that day, counsel for FLIR stated by e-mail that he did not believe that sufficient conferral had taken place. Counsel for Sierra Media replied by e-mail, and offered to confer further at any time convenient for FLIR’s counsel on November 30, 2010. In an e-mailed response, counsel for FLIR willfully refused to confer further.

MOTION

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendant Sierra Media respectfully moves to dismiss the Complaint filed against it by Plaintiff FLIR in its entirety for failure to state claims upon which relief may be granted. Sierra Media moves against the Counts in the Complaint as follows:

1. Count One: FLIR has failed to state a claim for false advertising under § 43 of the Lanham Act, 15 U.S.C. § 1125, because it has failed to plead its claims with requisite particularity, it has not adequately pleaded a false or misleading statement and it has not adequately pleaded injury.
2. Count Two: FLIR has not stated a claim for trade association/unfair competition under 15 U.S.C. § 1125(a)(1)(A) because it has not alleged a protectable trademark or trade dress, that Sierra Media used or imitated FLIR's mark without its consent, and that, as a result, consumers are likely to confuse Fluke Corporation's ("Fluke's") thermal imaging cameras for FLIR's.
3. Counts Three and Four: FLIR has failed to state claims for publication of injurious falsehoods or business disparagement in Counts Three and Four, respectively, and neither claim is recognized under Oregon law. Furthermore, even if those claims are recognized as claims for defamation, FLIR has not properly alleged a false statement of fact and has not properly alleged that that false statement had a cognizable injurious effect in the community.
4. Count Five: FLIR has failed to state a claim for civil conspiracy, because the alleged conspiracy is not founded on any substantive tort recognized by Oregon law, because it has not pleaded with requisite particularity, because it has not adequately pleaded

an underlying tort, and because it has failed to adequately allege facts supporting the existence of a conspiratorial agreement.

5. Count Six: FLIR has failed to state a claim for aiding and abetting in Count Six because the alleged aiding and abetting was not in furtherance of any substantive tort recognized by Oregon law, and because FLIR has not properly alleged facts sufficient to support a claim for aiding and abetting liability.
6. Count Seven: Count Seven is not pleaded against Sierra Media.
7. Counts Eight and Nine: FLIR has failed to state a claim on which relief can be granted in Counts Eight and Nine, because those Counts are simply requests for particular forms of relief, not separate causes of action.

Sierra Media therefore respectfully moves that the Complaint against Sierra Media be dismissed in its entirety.

DATED this 30th day of November, 2010.

Respectfully submitted,

s/ Benjamin N. Souede
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